Supreme Court of the United States

OCTOBER TERM, 1913.

CHARLES W. DALE, EDWARD ROTT and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt,

Appellants,

vs.

EDWARD M. PATTISON,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief for Appellee.

I.

STATEMENT OF QUESTION.

The question presented to the court for its consideration and determination upon the record in this case is, whether, as to distilled spirits marked as required by law and in the custody of the United States in a distillery bonded warehouse situated in the State of Ohio,

warehouse receipts signed, issued and delivered by the distiller and owner of the warehouse, in due course of business and much more than four months before his adjudication as a bankrupt, to a pledgee as collateral security for a loan of money, which receipts described particular barrels of spirits in said distillery bonded warehouse, by their serial numbers, number of wine and of proof gallons, date when made and number of warehouse stamps, constituted a valid pledge and equitable lien in favor of the pledgee, the validity of which neither the bankrupt, nor his trustees could be heard to question or deny.

The exact question presented by the record in this case was presented to this court and determined by it in favor of the validity of warehouse receipts issued and delivered to a pledgee under the circumstances hereinabove stated, for barrels of spirits deposited in a distillery bonded warehouse in Pennsylvania, in the case of

Taney v. *Penn. National Bank of Reading*, decided January 16, 1914, and reported in Vol. 34, Supreme Court Reporter, No. 7, p. 288.

It is only necessary, therefore, to consider in this brief, whether the rule laid down by this court with reference to warehouse receipts issued and delivered for spirits in distillery bonded warehouses in Pennsylvania, shall apply, under the same circumstances, to spirits similarly situated in Ohio.

II.

STATEMENT OF CASE.

The facts and the issues in this case are stated fully and correctly in the opinion rendered by the lower court,

the United States Circuit Court of Appeals for the Sixth Circuit, which constitutes a part of the bound record in this case. (Rec., pp. 90-100.)

They are also stated correctly, although, probably, not so fully in the brief filed in this case on behalf of Appellants. It is not necessary, therefore, to restate them here.

The answer and intervening petition of the appellee denies the title of the Trustees to the two hundred and ten (210) barrels of whiskey claimed by them in their application, stating their serial numbers, and claims that they were a part of a lot of eight hundred (800) barrels of whiskey pledged to the appellee by delivery of warehouse receipts therefor as security for certain loans.

The warehouse receipts mentioned in the answer and intervening petition are attached to it as exhibits. They are five in number and were issued and delivered to the appellee on and between February 23, 1906, and June 29, 1906, as shown by their dates. (For answer and intervening petition and exhibits thereto, see Rec., pp. 18-27.)

The amendment to the answer and intervening petition sets up, that, for more than forty years, there had been and still continued to be an established custom, generally known and acted upon, to regard and consider warehouse receipts as giving constructive possession of the barrels of whiskey mentioned therein and as conveying either an absolute title or a special interest, according to the nature of the transaction, and as partaking in many respects of the character of commercial paper, transferrable by indorsement either absolutely or as collateral security, and as investing the holder of the warehouse receipts with the title, property in, or possession of the barrels of whiskey mentioned in said receipts, according to the rights of the original parties to the transaction,

and as constituting the owner of the distillery bonded warehouse issuing and delivering such receipts as the bailee for the vendee or pledgee of the barrels of whiskey in said receipts mentioned, etc. (See Rec., pp. 28, 29 for amendment to answer and intervening petition.) All the facts alleged in the answer and intervening petition and the amendment thereto are admitted by the demurrer filed thereto.

III.

ARGUMENT.

The law of Ohio recognizes the rule that, actual physical delivery of pledged goods by the pledgor to the pledgee is not essential to the validity of the pledge as against the creditors of the pledgor when goods are so situated that actual physical delivery can not be made, or where, by trade usage, actual physical delivery is excused.

The opinion of the court from which this appeal is prosecuted in regard to the law of Ohio is entitled to great weight in the determination of the question as to what the Ohio rule is upon the facts above stated.

It was rendered by Judge Warrington, a lawyer in the full practice of his profession in the state of Ohio for thirty or more years prior to his appointment to the bench of the United States Circuit Court for the Sixth Circuit, and is reported in 196 Fed., p. 5, and is also to be found in the Record in this case, pp. 90-100.

The question as to the Ohio rule was argued fully in the lower court, both orally and by brief, and the Ohio cases cited in the brief filed here on behalf of appellants, were cited and relied upon by counsel for appellants in the lower court.

Section 8560 of the Ohio General Code (Revised Statutes, Section 4150), and Sec. 8619 of the Ohio General Code (Revised Statutes, Sec. 4197), cited and quoted in the brief filed here by counsel for appellants, were also cited and quoted in the brief filed in the lower court on behalf of appellants.

As to the relevancy of those Sections of the Ohio Statutes to the question before it, the lower court said (196 Fed., 12, Record at foot of p. 96):

> "The present transaction took place in Ohio. There is no statute of the state that appears to affect the present question."

The case of *Hunt* v. *Bode, Assignee,* 66 Ohio State, 255, as the lower court states in its opinion (196 Fed., 12, Rec. p. 97):

> "presents facts different from those in *Thorne* v. *Bank* (37 Ohio State, 254), and recognizes the principle that the delivery must be such as the nature of the case admits."

Before proceeding to the consideration of the case of *Hunt* v. *Bode, Assignee,* it is proper to call the attention of the court to page 13 of brief for appellants and to the sentence immediately following the title of the last mentioned case which reads as follows, viz:

> "There the debtor has deposited his whiskey in a warehouse and received a perfectly valid receipt."

The inference that might be drawn from that sentence, if attention were not called to it, is that, somewhere in the statement of facts, or in the opinion in the case of *Hunt* v. *Bode, Assignee,* it appeared that the warehouse receipts there mentioned were altogether different from

the warehouse receipts exhibited in the record in this case, which the appellants claim to be invalid. The warehouse receipts in *Hunt* v. *Bode, Assignee,* are mentioned as "warehouse receipts for whiskey" and whether deposited in a distillery bonded or in a commercial warehouse does not appear from the case as reported.

The presumption is that they were warehouse receipts of the same kind as those issued to the appellee in this case as the removal of whiskey from a distillery bonded warehouse to another warehouse is exceptional and is attended with expense and a large loss from evaporation incident to the removal.

Independent of the character of the warehouse receipts in *Hunt* v. *Bode, Assignee,* that case is conclusive authority for the proposition, that, in Ohio, the rule is that a delivery, in the case of a pledge, is good when it is such as the nature of the case admits.

The lower court in its opinion (196 Fed., 12, 13; Record, 97), has stated the facts in *Hunt* v. *Bode, Assignee,* relating to the delivery as a pledge of the warehouse receipts and the subsequent repledging by their owner of his equity therein, and has quoted from the syllabus and the text of the opinion in that case. The case of *Hunt* v. *Bode, Assignee,* states so clearly the Ohio rule with reference to delivery when there can be no actual physical delivery of the property, that other parts of the opinion are here quoted for the convenience of the court.

At the outset of the opinion in that case, p. 267, the question presented to the court for its determination with regard to delivery, is stated thus:

> "The Atlas National Bank, having in its possession certain warehouse receipts for a stock of whiskey given it by H. F. Stothfang in pledge as collateral for a loan of money made to him by

the bank, could the pledger make another valid pledge, or a transfer to Dieckmann of an interest in the same receipts, without any change of possession, as collateral security for a debt due him from the pledgor?"

On page 268, the Court, after referring to the fact that delivery of the property pledged is generally essential to a valid pledge, says:

"But it does not follow that actual or physical delivery should always accompany the sale or transfer, and this is also true as to the pledging of choses in action or other kinds of personal property. The delivery in some cases may be symbolical, such as the handing over the writing which constitutes the title to the property, just as was done in this case, to secure the Atlas National Bank for the money it had loaned to Stothfang. He delivered to the bank, not the one hundred and sixty-five barrels of whiskey, but the warehouse receipts for the same, which were its muniment of title and control of the property they represented. And when the pledgor desired to secure the payment of the note held against him by Dieckmann, he executed and delivered to him the transfer of all interest in the receipts which would remain, after the bank's claim should be satisfied. This transfer was not strictly a pledge, but an assignment and transfer of the stated interest in the warehouse receipts; but if it is desired that we call it a pledge, as has been done by counsel, we still observe, that constructive possession in the second pledgee would be sufficient, if the intent to deliver such possession is clearly apparent. It is the application of the familiar rule, that the transfer is complete and delivery made, when the owner has done all that he can do in the

premises, and has given such possession to the pledgee or transferree as the nature of the property and its situation will permit. In this case Stothfang owned a valuable equity in the warehouse receipts held by the bank, as their sale afterwards made manifest, and it was such interest in them that could be made the subject of sale and transfer, *and even pledge,* and certainly Stothfang gave to Dieckmann possession of all interest in and title to the receipts which would remain after the debt due the bank was satisfied. This was all the delivery that could then be made, and it was at least a constructive delivery, and this we think meets the demands of the law."

In support of its opinion the court, pp. 269-270, cites and quotes from,

Story on Bailments, Sec. 297.
Wilson v. *Little,* 2 Comstock, 143.
Tuxworth v. *Moore,* 9 Pick., 347.
Whitaker v. *Summer,* 20 Pick., 399.

The court will observe that in *Hunt* v. *Bode, Assignee,* the controversy was between the pledgee and the assignee in insolvency of the pledgor. The relation in which the parties litigant stood to each other in that case was identically the same as that which the appellants and the appellee sustain to each other in the case at bar.

The rule laid down in *Hunt* v. *Bode, Assignee,* is the same as the Pennsylvania rule.

White v. *Gunn,* 205 Pa., 229, states the Pennsylvania rule as follows:

"What, however, would be a sufficient delivery of possession and retention of it in one case might not be in another; and in saying that the rigor of the rule requiring the purchaser to

take and keep possession of property purchased by him has been relaxed, nothing more was meant than that the law does not have or set up an unbending test of the sufficiency of delivery and retention of possession to be applied to all cases, but that, in passing upon the sufficiency of possession taken by the purchaser in any particular case, there must be taken into consideration the character of the property, the use to be made of it, the nature and object of the transaction, the position of the parties and the usages of the trade or business."

The barrels of whiskey shown to have been pledged in this case, were identified by the warehouse receipts issued to the appellee in like manner as the warehouse receipts exhibited in *Taney, Trustee,* v. *Penn. National Bank of Reading.* (Supreme Court Reporter, Vol. 34, No. 7, p. 288, Advance Opinions, No. 7, March 1, 1914, p. 288.)

With regard to the intent and effect of the warehouse receipts in this case, counsel for appellee quotes here, as a part of this brief, that portion of the opinion of the lower court relating thereto (196 Fed., 14, 15, Record 98, 99):

"Furthermore, we must test the intent and effect of these warehouse documents as we should if the suit were between Rohrer and Pattison. As Judge Knappen said in *Re Cincinnati Iron Store Company, supra,* (167 Fed., 492; 93 C. C. A., 128):

"'A change of possession to the extent of furnishing notice to third persons becomes immaterial, as no rights of such persons have intervened.'

"It is to be observed, too, that in *Hunt* v. *Bode,* the controversy was between the pledgee and the assignee in insolvency of the pledgor;

and although a creditor of the assignor prosecuted the case to the Supreme Court, he failed. And in *Hurley* v. *Atchison, Topeka & Santa Fe Ry. Co., supra,* it was held (page 134 of 213 U. S., page 469 of 29 Sup. Ct., 53 L. Ed., 729):

" 'The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings.'

"See, also, *Wilson* v. *Leslie,* 20 Ohio, 161, 166; *York Mfg. Co.* v. *Cassell,* 201 U. S., 344, 351, 20 Sup. Ct., 481, 50 L. Ed., 782; *Security Warehousing Co.* v. *Hand, supra,* 206 U. S., 424, 425, 27 Sup Ct., 720, 51 L. Ed., 1117, 11 Ann. Cas., 789; *Zartman* v. *First National Bank,* 216 U. S., 134, 138, 30 Sup. Ct., 368, 54 L. Ed., 418.

"We are constrained to hold that, as between Rohrer and Pattison, the effect of the delivery of the warehouse documents was to invest Pattison with constructive possession of the barrels of whiskey described in the receipts. The warehouse documents contain the substantial elements of well understood warehouse receipts, and no question is made as to their form. It is clear that Rohrer intended to deliver, and Pattison understood that he was to acquire, constructive possession of the barrels of whiskey. This mutual purpose ought to be carried out if it can be. According to the present record, the transactions were entered into in good faith to secure loans of money then made. The description of the warehouses by their numbers and of the barrels containing the whiskey dealt with are specific and furnish accurate means of identification. The barrels bear serial numbers, and we have seen that the act provides that:

" 'No two or more casks or packages warehoused at the same distillery shall be marked with the same number.'

"We conclude on this record that the action of Rohrer was an appropriation of these barrels of whiskey to the purpose of securing Pattison and Pattison alone in respect of moneys then advanced by him. It results that if we are in error in our belief that constructive possession was given, at least an equitable lien on the whiskey was created. As the present learned Chief Justice, when speaking of certain municipal bonds, said in *Walker* v. *Brown*, 165 U. S., 654, 666, 17 Sup. Ct., 453, 457 (41 L. Ed., 865):

"'To dedicate property to a particular purpose, to provide that a specific creditor and that creditor alone shall be authorized to seek payment of his debt from the property or its value, is unmistakably to create an equitable lien.'

"See, also, *Fourth Street Bank* v. *Yardley*, 165 U. S., 634, 17 Sup. Ct., 439, 41 L. Ed., 855; *Gardner* v. *National City Bank*, 39 Ohio St., 600, 604; *Hurley* v. *Atchinson, Topeka & Santa Fe Ry., supra*, 213 U. S., 134, 29 Sup. Ct., 466, 53 L. Ed., 729; *Bank* v. *Day*, 150 Iowa, 696, 699, 700, 130 N. W., 800."

In addition to the cases cited by the lower court in its opinion, the attention of this court is called to what it has said with regard to the question of equitable lien in the concluding part of its opinion in

Sexton, Trustee in Bankruptcy, v. *Kessler & Co.*, 225 U. S., 90, 56 L. Ed., 995.

In the Taney case, both in this court and in the District Court and the Circuit Court of Appeals, it was contended that the Pennsylvania rule, established by a long line of authorities, that, "where there is nothing in the case but the retention of a physical possession by the

vendor, which he is capable of delivering to the vendee, such retention is fraud per se, and not merely evidence of fraud, even though there be nothing inconsistent with the most perfect honesty."

This Court disposed of that contention, however, by calling attention to the fact that the rule had never been applied by the Courts of Pennsylvania to cases, "where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usuages of the trade or business in which the sale was made."

In Ohio, the Pennsylvania rule, that, "the retention of possession by the vendor of goods which he is capable of delivering to the vendee, is fraud per se," never obtained.

In *Hombeck* v. *Vanmetre*, 9 Ohio, 153, the court, in its opinion, after referring to the rule in Pennsylvania and certain other states, holds that, in Ohio, "where the vendor in a bill of sale or mortgage retained the possession, that circumstance is *prima facie* evidence of fraud, but is not fraud *per se*."

In *Wilson* v. *Leslie*, 20 Ohio, 161, 166, it is held that:

> "But the mere fact that the mortgagee omitted, for several days or several weeks, to deposit his mortgage deed with the clerk of the township or recorder of the county, as the case might require, would by no means render his security void. *It would not be void as against the mortgagor, if not filed in the office at all.*"

If, therefore, the Pennsylvania rule is not applied in that state to cases "where the inherent nature of the transaction and the attendant circumstances are such as to preclude the possibility of a delivery by the vendor, that would be consistent with the avowed and fair purpose of the sale, or where the absence of a physical delivery is excused by the usages of the trade or business in which the sale was made," there is, certainly, no reason why the Ohio rule should be applied to preclude a delivery under the same circumstances.

The case of *Bode* v. *Hunt, Assignee*, and cases cited *supra*, are authority for the proposition that a delivery in Ohio, under the circumstances stated, is a valid delivery.

It was not necessary to the validity of the pledge that notice thereof should be given to the collector of internal revenue. Possession passed to the pledgee upon the delivery of the warehouse receipt. The collector would be under no legal obligation to pay attention to it and would ignore it. The U. S. government would be charged with no duty to the holders of warehouse receipts and could be placed under no legal obligation to them.

The general rule in the United States is that attornment is not necessary to complete symbolical delivery.

David v. *Russell*, 52 Cal., 611, 615.
Durr et al v. *Harvey*, 44 Ark., 301, 306, 307.

IV.

BRIEF FOR APPELLANTS CONSIDERED.

First.

Counsel for appellants endeavor to distinguish this case from the Taney case upon the ground, that, in the

Taney case, there was a delivery of the gauger's certificates as well as of the warehouse receipts.

The gauger's certificates appear to have been introduced at the hearing before the master, to whom a reference had been made, by the District Court, probably for the purpose of showing that the whiskey was in the warehouse and the number of gallons. The delivery of the gauger's certificates to the pledgee could not operate as a constructive delivery nor create an equitable lien as they were in no sense muniments of title. Neither the United States or its official, the gauger, occupied a contractual relation to the distiller or owed any official duty to him. It was the delivery to the pledgee of the warehouse receipts by the distiller which operated to place the pledgee in the constructive possession of the barrels of whiskey described therein. A delivery of the gauger's certificates merely would have meant nothing and would have conveyed nothing. The fact, therefore, that they accompanied the receipts does not add anything to the effect of the receipts, nor would the fact that they did not accompany the receipts have impaired the validity of the pledge.

The provisions of the U. S. Statutes with reference to the deposit of distilled spirits in distillery warehouses, their gauging and marking immediately upon their deposit therein, their subsequent regauging before withdrawal, or at the end of the seven years, to determine the allowance to be made for loss by evaporation are solely for the protection of the government in the collections of its taxes and to prevent frauds.

The government, as to its custody of distilled spirits in distillery bonded warehouses, owes no duties to third persons and will not undertake to perform any.

In *Taney* v. *Penn. Nat. Bank*, 187 Fed., 689, the Court, at p. 702, says:

> "The relation between the distiller and the officers of the government in custody of his whiskey is *sui generis*. It is prescribed by law and is not contractual."

Counsel for appellants contended in the lower court, as he does here, that, "in the Taney case the contract between the parties was actually based upon the gauger's certificates."

In answer to the claim so made, the lower court held (196 Fed., 11; Record, 95):

> "The present warehouse documents were executed and issued by the distiller. They each apparently bear the signature of a United States gauger, indicating that he gauged the whiskey described in the receipts, but there is nothing in the record to show that the original receipts in fact bear his signature. If the gauger did sign, such act could only amount to an individual statement of the presence of the whiskey; it would not bind the government. But it is admitted that Rohrer manufactured the whiskey and stored it in the warehouse and we need not consider that feature of the case."

Second.

Neither Section 8560, Ohio General Code (Revised Statutes, Section 4150), with regard to chattel mortgages, nor Section 8619, Ohio General Code (Revised Statutes, Section 4197), with regard to the loan of chattel property, relate or have any application to pledges or the mode by which a pledge of personal property may be effected.

In his brief filed in the lower court on behalf of appellants, counsel for appellants, in regard to those sections.

made the same claim that he does here, but the lower court disposed of his contention with the statement that,

> "There is no statute of the state that appears to affect the present question."

A chattel mortgage is another and different thing from a pledge. The mortgaged chattels remain in the possession of the mortgagor and unless the instrument creating a lien thereon should be recorded or filed as required by law, the mortgagor would be able to obtain a fictitious credit.

Section 8519 relates to a loan of chattel property and may be regarded in two aspects, either as a statute of repose or limitation as to parol loans of chattels, or as intended to prevent the lender of chattels from aiding the person to whom the loan is made to acquire a fictitious credit. In either view of the case, Section 8619 can not be construed to apply to pledges.

Chattel mortgages and instruments to secure the return of goods loaned, belong to a class of securities altogether different from pledges.

The true rule is that the class can not be enlarged by judicial construction so as to include other instruments not described, which have been held to be valid by the common law and entitled to enforcement in accordance with their terms.

In *Parshall et al* v. *Eggert, Sheriff*, 54 N. Y., 18, the facts were that a debtor issued to his creditor an instrument in the form of a warehouse receipt upon certain specified property in his own store. The debtor having absconded, the creditor exhibited the instrument to the debtor's clerk, who thereupon surrendered the keys of the store, containing the goods mentioned in the receipt, to the creditor who locked the store and took the

keys away with him. Later in the same day, the sheriff caused the door of the store to be unlocked by a smith and levied a writ of attachment on the goods. It was contended in the lower court by the sheriff, and the contention was sustained by the court, that the instrument in question was a security in the nature of a chattel mortgage and therefore absolutely void under the law of New York because not filed. The judgment was reversed by the Court of Appeals.

At page 23 of the opinion in the case, the court says:

> "A chattel mortgage is a present transfer of the title to the property mortgaged, subject to be defeated on payment of the sum or instrument it is given to secure. In default of performance by the mortgagor of the condition, the title of the mortgagee becomes absolute. (*Brownell* v. *Hawkins*, 4 Barb., 491; *Langdon* v. *Buel*, 9 Wend., 80; *Wilson* v. *Little*, 2 Coms., 443.) The instrument now in controversy, executed by Roche, declares the property mentioned in it to be held by him in his store for account of the plaintiffs, subject to their order, as security for his note, given that day for $1,450. In the absence of fraud, every instrument is to be construed so that it may have effect according to the intention of the parties, if that can be consistently with the rules of law. Had the property in question been delivered by Roche to the plaintiffs on the terms expressed in this paper, it would have created a valid pledge and not a mortgage. (*Story on Bailments*, Sec. 286; *4 Kent. Com.*, 138; *2 Kent Com.*, 581, 582). It may be considered as showing conclusively against Roche that the property was delivered by him to the plaintiffs, and redelivered by them to him to be held for them, according to the terms of the receipt. If there be any difficulty in

maintaining this view, it may be supported on another ground.

"I know of no authority denying the right of a party who has a contract for a pledge, ineffectual for want of delivery, to obtain a delivery at a subsequent time, and thus to validate the pledge. Upon general principles, the only obstacle which can prevent such a transaction from being effectual, must be the intervention of fraud. Certainly there is no rule of law which requires a pledge in writing to be filed as a chattel mortgage; nor is it consonant with any rules for the construction of statutes to borrow such a requirement as to pledges from the positive provisions which, when enacted, were introductive of a new rule, and which declared unfiled chattel mortgages absolutely void as against creditors; nor is there any warrant for saying that because a chattel mortgage unfiled could not be afterward filed with the effect to cut off the right of an intermediate creditor to avoid it as under the statute conclusively fraudulent, therefore, a pledge of undelivered goods can not be made effectual against an intermediate creditor by delivery, in the absence of fraud."

In *Thorne* v. *National Bank*, 37 O. S., 254, cited in brief for appellants, a debtor firm which was not a warehouseman, issued an instrument in the form of a warehouse receipt for goods in its own store to secure its creditor, Thorne. The debtor, thereafter, sold the goods and applied the money received from the sale to pay a debt due from it to the First National Bank, whereupon Thorne sued the Bank to recover the money so paid to it. Thorne was defeated in the action, the Court holding, (p. 260), that there was no change of possession and

therefore no pledge, and no chattel mortgage, much less a filing of such mortgage with the township clerk.

The facts in the Thorne case have been stated so that this court can see that it has no application whatever to the case at bar.

In the case now before the court, as in the Taney case, there could be no actual physical delivery of the barrels of whiskey mentioned in the warehouse receipts and identified by their serial numbers for the reason that, as stated by this court in the Taney case, they were, "in the complete control of the government," and, "effectually taken out of the distiller's power so that he was absolutely unable to make a physical delivery of them until the tax was paid."

The distiller can obtain no fictitious credit upon the faith that he has goods stored in a distillery bonded warehouse for two seasons, first, because the public has no access to such warehouse and can not know that he has distilled spirits stored therein; and, second, because the established usage of the trade is notice to all persons dealing with a distiller, that the distilled spirits, if any, stored in a distillery bonded warehouse may have been sold or pledged by means of warehouse receipts issued by the distiller.

The custom and trade usage set up in the amendment to the answer and intervening petition filed by the appellee (Rec., p. 28), does not conflict with any rule of law in the state of Ohio, statutory or otherwise, but is in strict conformity with the rule of law in Ohio as settled in the case of *Bode* v. *Hunt, Assignee,* and other cases cited *supra.*

The Ohio cases relating to chattel mortgages cited in the brief filed on behalf of appellants, all relate to instru-

ments of a class other and different from pledges, and, therefore counsel for appellee do not think it necessary to consider them. To do so would simply consume time without purpose.

The fact that the distiller, as the person whom the law now requires to pay the tax on distilled spirits before they can be removed from a distillery bonded warehouse (28 Stat. L. 563, Sec. 48), may, fraudulently or by mistake, sell the spirits to a third person, does not affect the question under consideration. A commercial warehouseman may do the same thing or a person having goods on deposit in a commercial warehouse, may by connivance with, or through the ignorance, oversight or carelessness of the warehouseman, procure the same thing to be done. An instance of this kind is afforded in *Second National Bank* v. *Walbridge*, 19 Ohio State, 419.

At the time of the transactions in this case, the receipts of commercial warehousemen were not negotiable instruments. They were not made so until May 9, 1908. (99 Ohio Laws, 400-412.)

The fact that the appellee might have pursued another mode of obtaining security does not affect the mode pursued here if otherwise valid, although counsel for appellants so contends.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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No. 330.

Supreme Court of the United States

OCTOBER TERM, 1913.

CHARLES W. DALE, EDWARD ROTT and HENRY AMPT, Trustees in Bankruptcy of David Rohrer,

Appellants,

versus

EDWARD M. PATTISON,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Additional Brief for Appellee.

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Court Index Press, 646-650 Main Street, Cincinnati, Ohio, April, 1914.

Supreme Court of the United States

OCTOBER TERM, 1913.

CHARLES W. DALE, EDWARD ROTT and HENRY AMPT, Trustees in Bankruptcy of David Rohrer, Bankrupt,

Appellants,

No. 330. *vs.*

EDWARD M. PATTISON,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Additional Brief for Appellee.

In Ohio the Rights of the Assignee in the Property Assigned are no Greater than those of the Debtor Prior to the Assignment.

On page 17 of the brief filed in this case on behalf of the appellants, counsel for appellants has cited the three following Ohio cases, viz.:

Hanes v. *Tiffany*, 25 O. S., 549,
Blandy v. *Benedict*, 42 O. S., 229, and
Westlake v. *Westlake*, 47 O. S., page 316,

and claims that they conflict with the rule laid down in *Wilson* v. *Leslie*, 20 Ohio, 161.

The rule in *Wilson* v. *Leslie* is stated upon page 12 of the brief filed herein by the counsel for appellee. At the time counsel for appellee wrote the brief filed by them herein, it did not seem to them to be necessary to refer to the cases cited by counsel for appellant on page 17 of his brief as they relate solely to chattel mortgages and have no bearing upon the question before the court in this case.

It has occurred to counsel for appellee, since the filing of the brief on behalf of the appellee, that it may be proper to call the attention of this court to the fact that the cases, *supra*, of *Hanes* v. *Tiffany*, *Blandy* v. *Benedict* and *Westlake* v. *Westlake*, in no way modify, conflict with or affect the ruling of the court in *Wilson* v. *Leslie*, 20 Ohio, 161.

In the case of *Hanes* v. *Tiffany*, 25 O. S., 549, the chattel mortgage there was held void and invalid because it did not comply with 66 Ohio Laws, p. 345, Sec. 2, with reference to mortgages given to indemnify the mortgagee against a liability as surety for the mortgagor. In such cases the section of the Ohio Law referred to required that there should be entered upon the mortgage by the mortgagee "*a true statement of such liability, and that the instrument was taken in good faith to indemnify against any loss that may result therefrom.*" This statement was required to be verified on oath. It was for the reason that the chattel mortgage there, did not have entered thereon the sworn statement required by the act referred to that it was held void as against the creditors of the mortgagor and, therefore, void as against the assignee for the benefit of creditors.

In *Blandy* v. *Benedict,* 42 O. S., 295, there was the same failure as in *Hanes* v. *Tiffany,* to enter upon the chattel mortgage the sworn statement required to be made upon a chattel mortgage executed to indemnify a surety.

The chattel mortgage was, therefore, held void both against creditors and the assignee for the benefit of creditors.

In *Westlake* v. *Westlake,* 47 O. S., 316, a chattel mortgage was executed jointly by two persons as mortgagors who resided in different townships. It was filed in the proper office in the township in which one of the two mortgagors resided, but it was not filed in the township in which the other mortgagor resided.

Section 4151, Ohio Revised Statutes, then in force, required that the mortgage should be deposited *"with the township clerk of the township where the mortgagor resides at the time of the execution thereof, if a resident of the state."*

The court held at page 317 of its opinion, that the word "mortgagor" in Section 4151, must be held to include the plural as well as the singular and that:

> "When a chattel mortgage is executed by several resident mortgagors, the statute requires that the mortgage, or a true copy, be filed in the township where the mortgagors at the time respectively reside, as essential to the validity of the mortgage as against creditors."

For the reason stated in the opinion of the court, the mortgage was held void as against the creditors of the mortgagors and the assignee for the benefit of creditors.

In *Wilson* v. *Leslie,* 20 Ohio, at page 166, the court says as to an unfiled chattel mortgage:

> "It would not be void as against the mortgagor, if not filed in the office at all. It would not be void as against that class of creditors who are equally remiss with the mortgagee and took no steps to fasten upon the property for the payment of their debts. Until placed in the proper office, the mortgage of chattels in our state would be void as against other creditors of the mortgagor and subsequent purchasers and mortgagees, whose rights then attach."

Brown & Co. v. *Webb*, 20 Ohio, 389, is to the same effect as *Wilson* v. *Leslie*. It holds that:

> "A mortgage of personal property, where the mortgagor retains possession by virtue of the mortgage, with a power of sale, is void, as against subsequent purchasers, and execution creditors, but when possession is taken by the mortgagee, the mortgage becomes valid so as to protect the mortgaged property from execution creditors not having made a levy, and against subsequent purchasers from the mortgagor."

Cass v. *Rothman*, 42 O. S., 380, cites *Wilson* v. *Leslie* with approval.

It also quotes with approval Section 237 of *Jones on Chattel Mortgages* to the effect that it is sufficient that the filing of chattel mortgages "*be done any time before possession is taken, or interest or liens are acquired by others.*"

In *Hodson* v. *Barrett*, 33 O. S., 63, it is held that:

> "In the case of an assignment of an insolvent debtor for the benefit of creditors, the rights of the assignee in the property assigned are not greater than those of the debtor prior to the assignment."

In *Morgan* v. *Kinney*, 38 O. S., 610, it is held that:

> "Under a deed of general assignment for the benefit of creditors, the assignee takes the real estate subject to all valid liens existing thereon against the assignor."

Counsel for appellee fail to see the pertinency here of the cases relating to chattel mortgages which have been cited in the brief upon behalf of appellants.

In the present case the delivery of the warehouse receipts for property so circumstanced that it could not otherwise be delivered, was long prior to the adjudication of Rohrer as a bankrupt.

The delivery made accorded with established trade usage and is recognized as valid under the Ohio rule stated in *Hunt* v. *Bode, Assignee*, cited in former brief of counsel for appellee.

It is respectfully submitted, therefore, that the judgment of the lower court should be affirmed.

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